IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 693 of 1988

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE :

HONOURABLE MR.JUSTICE KS JHAVERI :

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge

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GANESH ALIAS JAIRAMBHAI PAWAR - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR NK MAJMUDAR for Appellant(s) : 1,
MR KT DAVE APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 19/06/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE KS JHAVERI)

1.0 The appellant came to be tried for the offences punishable u/s. 363, 366 & 376 of the Indian Penal Code, 1860 (for short, "the IPC") by the City Sessions Court No. 17 at Ahmedabad in Sessions Case No. 79 of 1987. He was convicted for the said offences and sentenced to undergo rigorous imprisonment for a period of ten years and to pay fine of Rs.5,000/- and in default of payment of fine, to further undergo rigorous imprisonment for a period of one year.

2.0 The facts of the prosecution case are as under ;

On 25.04.1986 at around 7.00 a.m., the victim, who was studying in Standard VIII, left her home for school to appear in her school exams. After attending her exam, the victim didn't return home till late in the evening. Therefore, necessary search was conducted by her family members for her whereabouts. Since, it was within the knowledge of the mother of the victim that the appellant, nephew of one Saraswatiben, who earlier used to give tuition classes to the victim, used to tease the victim, necessary inquiry was made at the residence of the appellant.

2.1 Having come to know that the appellant was also missing, the mother of the victim filed a complaint against the appellant which was registered as I-C.R. No. 209/1986 before Amraiwadi Police Station for the alleged offences punishable u/s. 363, 366 & 376 of the IPC. It is alleged that the appellant, after luring the victim, abducted / kidnapped her from the lawful guardianship of her mother (since her father had already expired) and, thereafter, repeatedly committed rape on her.

2.2 Investigation was carried out on the said FIR. As the Investigating Officer found sufficient material against the appellant, the appellant came to be arrested. Thereafter, charge-sheet was filed in the Court of learned Metropolitan Magistrate, Court No. 7, Ahmedabad who, in turn, committed the case to the Court of Sessions and Sessions Case No. 693 of 1988 came to be registered.

2.3 The Sessions Court, on the basis of the evidence led by the prosecution, concluded that the prosecution was

successful in establishing the charges against the appellant and recorded conviction and passed sentence, as stated in earlier part of this judgment.

3.0 Mr. N. K. Majmudar learned Advocate for the appellant has contented that the prosecution has failed to prove beyond reasonable doubt that the age of the victim, at the relevant point of time, was below 16 years. He has submitted that there is no cogent evidence on record viz. Birth Certificate etc., to prove the age of the victim. He has submitted that the age of the victim, as reflected in the school records, was entered by the mother of the victim merely on presumption and without any basis and, therefore, the same could not be accepted to ascertain the age of the victim.

3.1 Learned Advocate for the appellant has submitted that the appellant and the deceased were in love with each other since last about two to three years prior to the date of the alleged incident. He has submitted that the

act, even if the same was committed, had taken place with the consent of the victim and in the absence of cogent evidence on record with respect to the age of the victim, the appellant could not be held guilty for the alleged offences.

3.2 Learned Advocate has further contented that the prosecution has failed to prove beyond doubt that on the date of the alleged incident, i.e. on 24.04.1986, the appellant had abducted the victim from the lawful guardianship of her mother and that he had married the victim against her consent. He has, therefore, submitted that the trial Court has committed serious error in law and on facts in convicting the appellant for the alleged offence. Hence, the impugned judgment and order passed by the trial Court deserves to be quashed and set aside.

4.0 Mr. K. T. Dave learned APP has contented that the evidence on record clearly goes to show that the victim was below 16 years of age at the time of the incident. He has submitted that from the depositions of the witnesses and the

evidence on record, it is very clear that the appellant, after kidnapping the victim from the lawful guardianship of her mother, committed rape on her several times. He has further submitted that the trial Court has rightly appreciated the documentary as well as oral evidence on record and convicted the appellant for the offence in question. Hence, no interference is required by this Court in this Appeal.

5.0 Heard learned counsel for the parties and perused the evidence on record. The prosecution has examined several witnesses to prove its case. The Doctor who has conducted the medical examination of the victim has been examined as PW – 1 at Exhibit – 9, the mother of the victim has been examined as PW – 3 at Exhibit – 17, a friend of the victim has been examined as PW – 4 at Exhibit – 21 and a friend of the appellant has been examined as PW – 5 at Exhibit – 22. The victim herself has been examined at Exhibit – 24 and the Ex-Principal of the Primary School where the victim had studied has been examined at Exhibit – 30.

6.0 The mother of the victim, PW – 3, has deposed that on the date of the incident, when she enquired about the whereabouts of the victim, she came to know that both the appellant as well as the victim were missing. Subsequently, she also came to know that some love affairs existed between the appellant and the victim and that they both had also taken some photographs together. Therefore, she filed the impugned complaint against the appellant before Amraiwadi Police Station.

6.1 PW – 3 has further deposed that the victim was born in Ajmer, Rajasthan on 11.12.1971. In support of the same, she has produced on record the Horoscope and the School Leaving Certificate of the victim vide Exhibits – 18 & 19 respectively.

6.2 In her cross-examination, the victim has deposed that PW – 4 at Exhibit – 21 is the friend of the victim and that she had knowledge of the fact that on the day prior to the date of incident, the victim had gone to the Court near

Gheekanta area of Ahmedabad City and had returned home late. From the deposition and cross-examination of this witness, it appears that the appellant had abducted / kidnapped the victim from the lawful guardianship of her mother while she had gone to the school.

7.0 The friend of the victim has deposed as PW – 4 at Exhibit – 21. In her deposition, she has stated that on the day prior to the date of incident, she had seen the appellant and the victim traveling together in an Auto-rickshaw. However, she is unaware about the fact as to where the appellant and the victim had gone in the said Auto-rickshaw.

7.1 In her cross-examination, she has denied that she had seen the appellant and the victim together in the Auto-rickshaw. However, she has admitted that she had met the appellant as well as the victim at the relevant point of time.

8.0 The prosecution has examined the friend of the appellant as PW – 5 at Exhibit – 22. In his deposition, he has

deposed that on 24.04.1986, the victim and PW - 4 were sitting in a Hotel situated near the Court at Gheekantha. He has further deposed that at that time, the appellant came at the said Hotel and took the signature of the victim in a paper and, thereafter, told her to return back home. However, the victim refused to go back home and informed the appellant that if he does not take her with him, then she would commit suicide by jumping into Kankaria Lake. At that time, the appellant told the victim that they would meet on the next day and, accordingly, convinced the victim to return back home. Thereafter, the victim left for her home.

8.1 PW – 5 has further deposed that on the next day, i.e. on 25.04.1986, they four, i.e. the victim, the appellant, PW – 4 and PW – 5, met in front of the High School and when they were about to leave in an Auto-rickshaw, a cousin of PW – 4 noticed PW – 4 and, therefore, PW – 4 got down of the Auto-rickshaw. Thereafter, they three went to the house of one of the friends of the appellant and from there, they went to a Theatre to watch a movie. After watching the

movie, at around 10 p.m., the appellant told PW – 5 to leave for his home, as the appellant informed him that he and the victim would be going to some other place. Accordingly, PW – 5 left the company of the appellant and the victim.

8.2 In her cross-examination, the said witness has admitted that in his statement before the police, he has not narrated the fact that the appellant had informed him that the appellant and the victim would run away from their homes for some other place.

9.0 From the depositions of PW – 4 and PW - 5, it clearly transpires that on 24.04.1986, the appellant met the victim in a Hotel near the Court in Gheekantha area of Ahmedabad City and that they had planned to meet on the next day i.e. on 25.04.1986. The deposition of PW – 5 clearly supports the story led by PW – 3 & PW – 4. It also transpires that on 25.04.1986, initially, while the appellant, the victim, PW – 4 & PW – 5 were to leave in an Auto-rickshaw, PW – 4 got down from the Auto-rickshaw, on realizing that one of her

cousins had noticed her. Thus, the depositions of PW – 3, PW – 4 & PW – 5 clearly support the prosecution case.

10.0 The victim herself has been examined at Exhibit – 24. In her deposition, the victim has deposed that on 24.04.1986, while the victim and PW – 4 were sitting in a Hotel near the Court in Gheekanta area of Ahmedabad City, the appellant and PW – 5 approached her and the appellant asked the victim to put her signature in a paper that contained some matter typed in English language. After getting her signature on the said paper, the appellant informed the victim that she has been married to the appellant and that the said paper is the proof of their marriage.

10.1 The victim has further deposed that on 25.04.1986, while the victim had gone to her school to appear in her exams, at that time, the appellant and PW – 5 were standing in front of her school with an hired Auto-rickshaw. Thereafter, the appellant compelled the victim to accompany him, PW –

4 & PW - 5 in the said Auto-rickshaw. However, when a cousin of PW – 4 noticed her, PW – 4 got down from the said Auto-rickshaw and, thereafter, the victim, the appellant & PW – 5 left the place in another Auto-rickshaw.

11.0 From the deposition of the victim, it is evident that the story narrated by her is clearly supported by the depositions of PW – 4 & PW – 5. Hence, we have no hesitation to conclude that the appellant had abducted / kidnapped the victim from the lawful guardianship of her mother.

12.0 For convicting an accused for the offence punishable u/s. 376 of the IPC, the age of the victim, at the relevant point of time, is of vital importance. Section 375 of IPC defines Rape. As per the said Section, a person is said to have committed "rape", who, except in the case of sexual intercourse with his own wife, not being under fifteen years of age, has sexual intercourse with a woman under the circumstances falling under any of the six descriptions provided therein. As per the description given in clause six of

Section 375, "rape" is said to have been committed, if the victim is under the age of 16 years, whether the act was with or without her consent, meaning thereby, that even if the victim admits that the act was performed at her will and consent, then also the ingredients of Section 375 would be attracted. The Court, in such circumstances, does not have to look into as to whether the act was done with or without the consent or will of the victim, if the victim, at the time when the incident took place, was below 16 years of age.

13.0 The case of the prosecution is that the date of birth of the victim is 11.12.1971 and that, at the relevant point of time, she was below 15 years of age. In support of their case, the prosecution has produced on record the School Leaving Certificate issued by Kalyan High School wherein, the date of birth of the victim is shown as 11.12.1971 and also the Horoscope of the victim.

13.1 It is matter of record that the prosecution has not produced any document on record issued by any statutory

authority under the law viz. a Birth Certificate etc,. The main contention of the appellant is that in the absence of any such documentary evidence on record, the trial Court ought not to have convicted the appellant for the offence punishable u/s. 376 of the IPC.

14.0 The prosecution has examined the Ex-Principal of the Primary School at Exhibit – 30. The said witness has deposed that while admitting any child to the school, the parents / guardian have to submit all the details as prescribed in the Admission Form of the school. She has deposed that the Admission Form of the victim was filled by her, at the relevant point of time, as per the details provided by the mother of the victim, PW – 3. The said Admission Form has been produced on record vide Exhibit – 31 wherein, the date of birth of the victim has been shown as 11.12.1971.

14.1 She has further deposed that the mother of the victim, at that point of time, had produced some documentary evidence with respect to the age of the victim,

without which the victim would not have been admitted to the school. However, she does not remember as to what evidence was produced by her with respect to the age of the victim at that point of time. She has further deposed that as per the details submitted in the Admission Form, necessary entries were also made in the General Register of the School. In the General Register so maintained by the school, the date of birth of the victim is shown as 11.12.1971, copy of which is produced on record vide Exhibit – 10.

14.2 In her cross-examination also, the said witness has deposed that the Admission Form was filled by her as per the details provided by the mother of the victim at the time of admitting the victim in Class – I of the school.

15.0 From the deposition of this witness as well as the evidence on record in the form of the Admission Form and the General Register of the School, it is evident that the age of the victim is 11.12.1971. It is not in dispute that the prosecution has not produced on record any document

issued by any statutory authority viz. a Birth Certificate etc., to prove the age of the victim. However, in her deposition, the Ex-Principal of the Primary School has specifically stated that the date of birth of the victim, as appearing in the Admission Form, was entered on the basis of some documentary evidence produced by the mother of the victim at the relevant point of time. Thus, the fact remains that the mother of the victim had produced some documentary evidence with respect to the age of the victim while taking admission of the victim in Class – I of the school, on the basis of which the victim was admitted in the school and her date of birth was entered in the Admission Form as also the General Register.

16.0 The medical evidence on record in the form of deposition of the Doctor of the Civil Hospital, Ahmedabad, who has conducted the medical examination of the victim and who has deposed as PW – 1 at Exhibit – 9, also supports the case of the prosecution.

17.0 Thus, having gone through the depositions of the mother of the victim PW – 3, the victim herself at Exhibit – 24, the Ex-Principal of the Primary School at Exhibit – 30 and the documentary evidence on record in the form of the School Leaving Certificate at Exhibit – 19, the Admission Form at Exhibit – 31 and the General Register of the School at Exhibit – 10, it could be concluded that the date of birth of the victim is 11.12.1971 meaning thereby, that at the time of the incident, the victim was 14 years, 4 months and 14 days old. Considering the documentary as well as oral evidence on record, we are of the opinion that the prosecution has succeeded in proving beyond doubt that the victim was below 16 years of age at the relevant point of time.

18.0 Now, since it is established that the victim was below 16 years of age at the time when the incident took place, offence u/s. 376 of the IPC is said to have been committed in view of the provisions of Section 375 of the IPC. In the present case, from the deposition of the victim herself, it is evident that the 'act' was done against her will and

consent. Apart from that the defence of marriage taken by the appellant does not hold any ground in view of the fact that even if marriage is said to have taken place, the same could not be treated as legal and valid, since it is established that the victim was below 18 years of age at the relevant point of time. Therefore, we have no hesitation in holding the appellant guilty of the offence punishable u/s. 376 of the IPC.

19.0 In view of the above discussion, we hold that the trial Court has rightly convicted the appellant for the offences punishable u/s. 363, 366 & 376 of the IPC. We are in complete agreement with the reasonings given by and the findings arrived at by the trial Court and, therefore, find no reasons to interfere with the impugned judgment and order. Hence, the Appeal deserves to be rejected.

20.0 In the result, the Appeal is dismissed. The impugned judgment and order dated 28th July, 1988 passed by the learned Addl. Sessions Judge, City Sessions Court No. 17, Ahmedabad in Sessions Case No. 79 of 1987 is confirmed.

The appellant is directed to surrender to the custody within a period of **FIVE WEEKS** from today.

(Anil R. Dave, J.) (K. S. Jhaveri, J.)

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